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No. 99-2036

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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, ET AL.,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF DOUGLAS LAYCOCK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS

Amicus Douglas Laycock is Professor of Law at The University of Texas at Austin. I have studied issues of free speech and religious liberty for many years, and I have supported vigorous enforcement of the Establishment Clause as well as the Free Speech and Free Exercise Clauses. Last Term, I represented plaintiffs who objected to school-sponsored prayer at football games in *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000).[1]

In earlier years, I filed the principal amicus brief in support of a family who objected to school-sponsored prayer at graduation in *Lee v. Weisman*, 505 U.S. 577 (1992), and an amicus brief in support of those who objected to a school district drawn on religious lines in *Board of Education v. Grumet*, 512 U.S. 687 (1994). I have also filed amicus briefs on the other side of the long-running battle over prayer and religious meetings in public schools, supporting the rights of religious speakers in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), and *Board of Education v. Mergens*, 496 U.S. 226 (1990). I have addressed the issues surrounding this case in a scholarly article, Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986), and in testimony opposing any form of school-prayer amendment to the Constitution. Statement, in *Religious Liberty, Hearings*

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[1] I prepared this brief myself, without consulting counsel for any party. No other person made any financial contribution to the preparation or submission of this brief. I file this brief in my personal capacity as a scholar, and of course The University of Texas takes no position on the issues in this case.

Before the Senate Committee on the Judiciary, 104th Cong., 1st Sess. 66 (1995) (S. Hrg. 104-758).

This brief speaks in my own voice and offers expertise from a position of relative neutrality in the so-called culture wars. I attempt to place this case in broader constitutional context, to emphasize why staunch opponents of school-sponsored prayer should support petitioners' claim to free speech here, and to identify the clear rule that consistently explains this Court's cases on religious speech in public schools. I also diagnose a weakness or loophole in the Court's public forum doctrine – a weakness that is facilitating misunderstanding or evasion of the Court's rules on religious speech.

This brief is filed with consent of the parties. Petitioners' consent is on file with the Court, and respondent's consent is submitted with the brief.

SUMMARY OF ARGUMENT

This case is controlled by the clear principle to which this Court has adhered for forty years, crystallized in *Board of Education v. Mergens*, 496 U.S. 226 (1990): "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250 (plurality opinion). If the school controls the speech, arranges for the speech, or gives preferential access to the speech, it is governmental speech. If not, it is private speech. This Court has never found an exception to the part of this rule protecting private speech. This Court has *never* held, in *any* context, that government may or must discriminate

against a private speaker based on the religious content of his speech.

This rule has encountered continuing resistance from both sides. Whether from innocent confusion or deliberate evasion, anti-prayer school districts have resisted this Court's free speech cases as vigorously as pro-prayer school districts have resisted the establishment clause cases. Milford's argument this Term is no better than Santa Fe's argument last Term. Both sides of the dispute require clear rules that are hard to evade.

Meetings of the Good News Club would be private speech under this Court's cases. Milford Central School has created a designated forum, open to community groups in general, and actively used by groups teaching morals and character development to children. Milford excludes the Good News Club from that forum because it teaches that morals should be based on Christian faith. This is viewpoint discrimination, pure and simple.

The attempt to recharacterize this discrimination as a mere subject matter exclusion fails on its own terms. Club meetings are not confined to topics on which there is no secular viewpoint, such as the nature of the Trinity. Instead, they address issues of morals and character development that are also addressed from secular perspectives. The court below did not dispute this. Rather, it held that whatever the Club says about morals and character development is tainted by what it says about faith, and that the whole is therefore excludable. The source of this taint is the Club's viewpoint – in particular, its view that childrens' morals should be based on Christian faith.

More generally, the distinction between religion as viewpoint and religion as mere subject matter is untenable and subject to abuse. Religion is both, as this Court has repeatedly recognized. For people who believe that religious faith is a principal source of instruction on all the other important decisions in their lives, religion is both a prolific source of viewpoints and a vitally important subject matter. For people who do not share the underlying viewpoint, religion is neither a source of other viewpoints nor a subject matter worth discussing. When viewpoint and subject matter are so closely aligned, constitutional rights cannot be made to depend on the distinction without close judicial scrutiny.

It appears that the real operative rule in the Second Circuit is not a distinction between religious viewpoint and religious subject matter, but a per se ban on speech that resembles religious worship – no matter what viewpoints it expresses. This rule violates the ban on viewpoint discrimination. Moreover, a distinction between worship and other religious speech was expressly considered and rejected in *Widmar v. Vincent*, 454 U.S. 263 (1981).

More generally still, this case illustrates a weakness or loophole in this Court's public forum doctrine. Decisions to restrict the subject matters or classes of speakers in a designated forum, or to close the designated forum entirely, appear to be largely immune from judicial review. This leaves important rights of free speech to the unrestricted discretion of government officials. Subject matter exclusions can readily be manipulated to achieve viewpoint results, and inevitably have important viewpoint consequences even without manipulation. Exclusion of a controversial subject matter necessarily insulates

the status quo. It is futile for the Court to strictly scrutinize viewpoint discrimination if it gives no scrutiny to subject matter exclusions.

This larger doctrinal problem need not be solved to decide this case, but solutions are available. One solution to the larger problem may be found in the concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-703 (1992) (Kennedy, J., concurring). A more modest solution would be to require some functional justification for limits on, or closures of, designated fora.

Finally, permitting the Good News Club to participate in the designated forum on an equal basis would not violate the Establishment Clause. That is settled in this Court's cases, and the elementary school context does not change the result. Milford has offered no evidence that the children cannot understand the difference between a school program and an outside program, and it has made no effort to explain the difference. The difference can be explained in simple terms, appropriate to the age of the children.

More fundamentally, the argument that the children cannot understand proves nothing, because it cuts both ways. Assume the children cannot understand that permitting the Club to meet is not an endorsement. On that assumption, they certainly cannot understand that excluding the Club because of its religious views is not a statement of hostility to religion. Indeed, their perception of censorship would be accurate; their hypothetical perception of endorsement would be mistaken. A reasonable perception of endorsement must be based on some favoritism from the school, subtle or flagrant. There is no

favoritism, and no basis for a perception of endorsement, in admitting the Club to a designated forum on equal terms with other programs for children.

ARGUMENT

I. The Religious Speech at Issue Is Private Speech, Protected by the First Amendment.

For forty years, litigants have brought to this Court a steady flow of cases concerning religious speech in the public schools. And for forty years, this Court has decided those cases with remarkable consistency. Without a single exception in all that time, this Court's school cases are explained by the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

This distinction between government speakers and private speakers is at the very core of the First Amendment. The difference between protected free speech and free exercise of religion, on the one hand, and forbidden establishment of religion on the other, is the difference between private action and government action. In our system, religion is left wholly to private choice. Citizens may freely debate, practice, and implement their religious beliefs, but government may not participate. *Lee v. Weisman*, 505 U.S. 577, 589-92 (1992). Government's duty is to protect both religious and secular speech and to remain neutral between the two. In places where government permits expression of a diverse range of views, it has

neither the duty nor the authority to exclude religious speakers.

By carefully distinguishing government speech from private speech, this Court has adhered to a rule against school-*sponsored* prayer. But the common phrase to describe these cases in popular speech is simply "school prayer." The shorter phrase is not harmless, for it omits the critical concept of government sponsorship. And indeed, the more aggressive advocates on each side seem to reject the Court's focus on school sponsorship. One side would permit schools to sponsor prayer and religious instruction; the other side would prohibit all prayer and religious instruction in or about public schools, no matter how privately organized.

These extreme positions are of course inconsistent with the basic principle in this Court's cases. So litigants on both sides have taken to offering strained interpretations of the principle. Last Term, supporters of school prayer claimed to see purely private speech in an elaborate scheme to accord exclusive access to a single student who would lead large crowds in prayer; the Court properly found school sponsorship. *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000).

In this case, opponents of school prayer claim to see government sponsorship in mere equal access. Milford claims that it would be school sponsorship merely to permit a private group to meet after school under the terms of a policy that opens school facilities to a vast range of community groups, and that opening school facilities to secular community groups while excluding religious community groups is neither discrimination nor censorship but merely a neutral definition of the scope of

the school's forum. In sharp contrast to Santa Fe's single speaker with exclusive access to the public address system, Milford really does have a diverse array of community groups using its designated forum. Milford's claims are no more plausible than Santa Fe's. Both school districts – Milford this year and Santa Fe last year – are in fact rejecting the basic principle that has guided this Court's cases for forty years.

Whether from innocent confusion or deliberate evasion, there is a similar history of resistance on both sides of the issue. Before the Equal Access Act, 20 U.S.C. § 4071 *et seq.* (1994), many school districts in New York and elsewhere prohibited religious speech without explanation or out of exaggerated concerns about the Establishment Clause. *See, e.g., Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980). After the Equal Access Act defined open fora in secondary schools in terms of whether the school permitted "one or more noncurriculum related student groups," 20 U.S.C. § 4071(b) (1994), these schools insisted that the Act had no effect, because every secular club is curriculum related but religion clubs are not. This Court rejected that claim in *Mergens*, 496 U.S. 226 (1990). Then these school boards said that in any case outside the scope of the Act, religion would be an excluded subject matter even if the school had created a public forum. This Court rejected that claim, holding that religious speech expresses protected viewpoints. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). These school boards still did not change their behavior; now they seek to exclude some subset of religious speech that assertedly does not express protected viewpoints. This subset is ill-

defined but substantial; it seems to include all or substantially all religious speech and to largely nullify *Lamb's Chapel*.

The schools' argument and the definition of what is excluded have been repeatedly fine-tuned, but the common theme is the same: some school boards will discriminate against religious speech until this Court adopts unambiguous rules that eliminate all room for misunderstanding or evasion. These anti-religious school boards are every bit as persistent as the pro-religious school boards in cases like *Santa Fe*. The Constitution is equally offended in each case: when a religious majority in Santa Fe imposes its prayers on religious and secular minorities, and when a secular majority in Milford denies a religious minority the right to meet and teach its faith to those who wish to learn it. In each set of cases, the solution is to avoid rules that facilitate misunderstanding or evasion.

Identifying government sponsorship is not so difficult as it is made out to be by litigants unhappy with the underlying rule. Justices have disagreed about nuances in the formulation of a test, but all of this Court's judgments are consistent with the simple rule that if persons are speaking in their private capacities, then government cannot discriminate for them or against them based on the religious content of their speech.

To elaborate: Religious speech is attributable to the government if government employees select the religious message, *Engel v. Vitale*, 370 U.S. 421 (1962), deliver the religious message, *Abington School District v. Schempp*, 374 U.S. 203 (1963), encourage or endorse the religious message, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Treen v. Karen B.*,

455 U.S. 913 (1982), arrange for the religious message, *Lee v. Weisman*, 505 U.S. 577 (1992), or give an otherwise private speaker preferential access to a school forum, program, audience, or facility, *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000); *Stone v. Graham*, 449 U.S. 39 (1980). This Court has found no exception in a school context to the rules stated in this paragraph since *Zorach v. Clauson*, 343 U.S. 306 (1952).

Zorach is an exception to the rule against government sponsorship, at least as measured by the criteria in the preceding paragraph, because the school provided preferential access to a school audience. The school created a "forum" in which the only choices were religious instruction at a local church or essentially custodial care by the school. The Court upheld the program anyway. There have also been two more recent exceptions outside the school context. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting municipal Christmas display); *Marsh v. Chambers*, 463 U.S. 783 (1983) (permitting legislative prayer).

These cases permit government to sponsor religious messages in certain limited contexts. With respect, I believe that all three of these cases were wrongly decided, and I do not rely on them here. My position is not that government may support religion a little bit, and certainly not in public schools. Rather, my position is that permitting religious groups to meet on the same terms as other groups is no support at all, and that forbidding them to meet on equal terms is anti-religious censorship.

If government has not endorsed religious speech by one of the means just discussed, that speech is private, and constitutionally protected. To elaborate: If a private

speaker selects and delivers his own message, if government employees express no opinion about that message, if government employees do not invite or arrange for the message, if government employees give the speaker no preferential access to government fora, programs, audiences, or facilities, and in general, if government employees treat the religious speaker like secular speakers similarly situated, the religious speech is attributable to the private speaker. This is the rule in public schools. *Lamb's Chapel*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226 (1990). It is the rule in higher education. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). It is the rule on other government property. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). This Court has *never* found an exception in *any* context to the rule stated in this paragraph.

The point is broader than speech on government property. This Court has never doubted the right to make religious arguments in political debate, *see Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and it has upheld the right of clergy to hold political office. *McDaniel v. Paty*, 435 U.S. 618 (1978). *See generally* Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. Davis L. Rev. 793 (1996). This Court has *never* held in *any* context that government may or must discriminate against a private speaker based on the religious content of his speech. The judgment below is without precedent in this Court.

II. The Second Circuit Rule, Authorizing Exclusion of Speech on Religious "Subject Matter," Is Inconsistent With This Court's Cases and With the Free Speech Clause.

A. Exclusion of the Good News Club Is Viewpoint Discrimination.

Milford has excluded the Good News Club squarely on the basis of its viewpoint. Moral instruction and character development from a secular viewpoint is permitted; moral instruction and character development from a religious viewpoint is forbidden. This is viewpoint discrimination, and not a mere subject matter exclusion.

This Court has twice rejected the argument that religion is just a subject matter and not a source of viewpoints on the whole range of other issues facing society. *Rosenberger*, 515 U.S. 819 (1995); *Lamb's Chapel*, 508 U.S. 384 (1993). The Second Circuit has attempted to distinguish those cases by holding that religion is *sometimes* a source of viewpoints and *sometimes* just a subject matter. *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000); *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997). For reasons to be explained, I believe this distinction is fundamentally flawed. But even taking the distinction on its own terms, it cannot explain the judgment below.

The Second Circuit's distinction between subject matter and viewpoint presupposes a religious discussion that is directed entirely inward, directed to purely religious questions, and expressing no viewpoint on any issue that might also be addressed from a secular viewpoint. An example might be a theological disputation about the

nature of the Trinity. A religious discussion directed outward, to issues that could also be addressed from secular viewpoints, is necessarily expressing a religious viewpoint on those other issues.

The Good News Club's discussions are directed outward. The Club addresses issues of morals and character development of children that can also be addressed from secular viewpoints, and that in fact are addressed from secular viewpoints by other organizations in the forum at Milford Central School. To exclude the Club's religious viewpoint on these issues is viewpoint discrimination, barred by this Court's cases, even if that expression of viewpoint is only part of the discussion.

The holding below is not that the Good News Club expressed no viewpoints on matters of secular significance, but rather that its protected expressions of viewpoint on morals and character development are disqualified by related discussions that the court of appeals found too religious. "Though [the Club's] teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier, contains *an additional layer*." *Milford*, 202 F.3d at 509 (emphasis added). "The activities of the Good News Club do not involve *merely* a religious perspective on the secular subject of morality." *Id.* at 510 (emphasis added). "[T]he Good News Club goes far *beyond merely stating its viewpoint*." *Id.* (emphasis added). This "additional layer" may be barred, allegedly because it is subject matter and not viewpoint.

This is a holding of taint: that a discussion of Christian faith so taints the discussion of morals and character development that both discussions are disqualified from

the forum. *Rosenberger* rejected this notion of taint; it was not disqualifying there that the disputed magazine was permeated with expressions of evangelical Christian faith. *See* 515 U.S. at 825-26; *id.* at 865-67 (Souter, J., dissenting). The magazine drew on that faith to express viewpoints on a wide range of issues facing college students, and that was the dispositive fact. *Id.* at 828-37 (opinion of the Court). The *Lamb's Chapel* opinions say less about the content of the disputed film series in that case, but almost certainly those films contained expressions of Christian faith that would be disqualifying under the decision below. *See* 508 U.S. at 388-89 n.3, especially paragraph 5. The Second Circuit's distinction, as applied in this case, in fact distinguishes nothing.

The source of the disqualifying taint is precisely the Club's viewpoint. The Good News Club believes that children are more likely to adopt sound moral principles, and more likely to live up to those principles, if their moral efforts are supported by Christian faith. That viewpoint links the several parts of a Good News Club meeting and makes the discussion of Christian faith an integral part of the discussion of morals and character development. And in the opinion below, it is the manifestation of that viewpoint that disqualifies the Club from speaking. This is precisely the viewpoint discrimination that this Court's decisions forbid.

B. The Distinction Between Religion As Viewpoint and Religion As Subject Matter Is Untenable and Readily Subject to Abuse.

However formulated, the distinction between religion as viewpoint and religion as subject matter is untenable. Religion is both viewpoint and subject matter, and it

is commonplace for discussions of faith or theology to be integrally connected to discussions of morals and other issues that are also addressed from secular viewpoints. Nearly all religious believers think that their faith has implications for their morals and for other issues in their life.

The Second Circuit's original and still principal example of religion as mere subject matter, free of viewpoint, is a worship service. *Full Gospel Tabernacle v. Community School District 27*, 164 F.3d 829 (2d Cir. 1999); *Bronx Household*, 127 F.3d 207 (2d Cir. 1997). Its opinion in this case relies principally on a perceived analogy between certain elements of a Good News Club meeting and certain elements of a worship service. *Milford*, 202 F.3d at 510. Perhaps the true Second Circuit rule is simply that worship services (and any other speech that too closely resembles elements of a worship service) can be excluded.

If this is the rule, it has nothing to do with the distinction between viewpoint and subject matter. It is common for worship services to express viewpoints on moral and other issues, in the sermon or homily, in the scripture readings, or in other ways. The Second Circuit rule appears to be that worship-like speech may be excluded no matter how many viewpoints it expresses on issues that can also be addressed from secular viewpoints. But if that is the Second Circuit rule, it is in the teeth of this Court's emphatic prohibitions on viewpoint discrimination. It is also in the teeth of *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that on-campus worship services are protected by the Free Speech Clause, *see id.* at 265 n.2 (describing the disputed meetings), and which

expressly rejected any distinction between worship services and other religious speech, *id.* at 269-70 n.6.

Widmar rejected any distinction between religious worship and other religious speech for three sound reasons: that the distinction lacks intelligible content; that even if the distinction could be specified, government would be incompetent to administer it; and that there is nothing in first amendment policy or principle to support it. *Id.* There is a fourth reason: any attempt at enforcement requires the censor to monitor meetings in the most intrusive way. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 56-57 (1986) (elaborating all four points). A clear illustration of the final point comes from The University of Texas, which for a time before *Widmar* tried to enforce a rule that student meetings and rallies could speak about religion but could not proselytize. An assistant dean of students found himself assigned to monitor daily rallies and pull the plug on the loudspeaker when he thought a group had stepped over the line. *Id.* at 57. Such Orwellian absurdities are the inevitable outcome of any serious effort to draw fine distinctions between kinds of religious speech.

Subject matter and viewpoint are so closely linked in the case of religion that it is nearly impossible to distinguish religious speech that expresses viewpoints on matters of secular significance from religious speech that does not. Even if it is possible in a few cases, it is impossible in most cases. For people who believe that religious faith is a principal source of instruction on all the other important decisions in their lives, religion is both a prolific source of viewpoints and a vitally important subject matter. For those who believe that religion is

marginal to their lives, or an imaginary construct, or a negative influence in other people's lives, religion is rarely a source of viewpoints and rarely a relevant subject matter. When subject matter and viewpoint are so closely aligned, it is naive to think that courts or administrators can exclude the subject matter without discriminating against the associated viewpoints. Certainly they have not done so here.

This untenable distinction is the key to the judgment below and to similar judgments in a wide range of contexts. The judgment below is in no way based on the fact that this case arises in an elementary school. The judgment is not based on the Establishment Clause, nor on any view that there is no right to a forum in elementary schools. The judgment is based squarely on the Second Circuit's rule that religious speech with elements of worship is mere excludable subject matter and not a viewpoint. This rule is regularly applied to adults and to contexts unrelated to schools. The rule originated in *Bronx Household*, 127 F.3d 207 (2d Cir. 1997), a case in which a church sought to rent space on the weekend.

The Second Circuit's rule is spreading to other circuits and other facilities. It has been applied to use of school facilities by an adult community group in *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000). Similar arguments were made in an unsuccessful attempt to exclude a film from a senior citizens' center, *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), and are at issue in a pending case about use by an adult community group of community meeting rooms in a village hall. *DeBoer v. Village of Oak Park*, 86 F. Supp. 2d 804, 810-11 (N.D. Ill. 1999), *appeal pending*. This Court should squarely consider, and squarely reject, the Second

Circuit's rule authorizing exclusion of religious subject matter from public facilities.

C. This Court's Current Formulations of Forum Doctrine Invite Censorship of the Kind at Issue in This Case.

Milford's exclusion of religious subject matter is a misunderstanding or evasion of this Court's decisions in *Lamb's Chapel* and *Rosenberger*. But evasion is made possible, perhaps even invited, by weaknesses or loopholes in this Court's formulation of public forum doctrine. It is not necessary to clarify or reform that doctrine to reverse the judgment below. But clarification could avoid similar difficulties in future litigation.

It is by now familiar doctrine that this Court's free speech cases recognize three kind of fora. The first is "property that has traditionally been available for public expression." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Second is "the designated public forum," property that is a forum because the government said so. *Id.* Third is the nonpublic forum on "all remaining public property." *Id.* at 678-79.

A designated forum may be limited by subject matter or speaker identity. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). A nonpublic forum may be open to selected private speakers. *Id.* Thus in both designated and nonpublic fora, government has substantial power to pick and choose who will be permitted to speak and what they will be permitted to discuss. Of course this power is not unlimited. Viewpoint discrimination is forbidden in any kind of forum. *ISKCON v. Lee*, 505 U.S. at 678-79. And so long as a

designated forum remains open, government must have a compelling reason for excluding a speaker who falls within the forum's designated limits. *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998). But government can exclude unwanted speakers by further restricting the designated subject matters or classes of permitted speakers, or by closing the designated forum entirely. And under current doctrine, these forms of restriction are largely exempt from judicial review.

The most troubling thing about the Court's three-category formulation is that censorship can become self-justifying in the second and third categories. The government's desire to exclude a speaker may be justified by showing its intent to close or limit the forum, and that intent may be shown by evidence that it has excluded other speakers in the past. A choice to close or limit a designated forum is not constrained by any requirement that all speech or speakers be treated equally, nor by any requirement that there be functional reasons for designating certain subject matters or classes of speakers. Outside the traditional public forum, the only real protection is that exclusion of speech must be reasonable and not based on viewpoint discrimination. *See generally* Laycock, 81 Nw. U.L. Rev. at 45-50.

Of course decisions to limit or close a designated forum often do have functional reasons, but the Court's doctrine does not appear to require such reasons. The Court has been sensitive to the need to preserve government property for its intended functions, and speech that disrupts those functions may be excluded. *See Forbes*, 523 U.S. at 672-76; *Cornelius*, 473 U.S. at 804. The Court has

recognized that if it overrides legitimate functional concerns, government may close a forum altogether, resulting in less speech rather than more. *Forbes*, 523 U.S. at 680-82.

In addition to avoiding disruption of governmental functions, fora are commonly limited as a means of rationing scarce resources, as in *Forbes*, or to set the agenda for a focused discussion, as in a journal, website, or conference devoted to a particular topic. Fora may be limited to speakers associated with the government institution that operates the forum, as when college campuses operate a forum only for students, faculty, and staff. The Court's forum doctrine avoids interfering with such functional distinctions, and undoubtedly the Court formulated the doctrine with such functional distinctions in mind.

But as this case illustrates, the current doctrinal formulation invites much more. Even without closing a designated forum, government may manipulate or gerrymander the limits on the forum to exclude undesired speakers. Milford has no functional reason for excluding religious subject matter save its hostility to religion or its mistaken view of the Establishment Clause. There is no claim of a need to ration scarce space – and even if there were, space could not be rationed on a ground so closely allied to viewpoint. *See Rosenberger*, 515 U.S. at 835. There is no claim of a narrow focus to which religion or moral instruction is simply irrelevant; the forum is open to substantially all secular community groups. Milford excludes the subject matter of religion by fiat, without offering any plausible reason. By excluding the subject matter of religion, Milford wholly excludes many religious viewpoints, and severely limits the

expression of all religious viewpoints. It is futile for the Court to closely scrutinize viewpoint discrimination if it gives carte blanche to subject matter discrimination and permits subject matter to be defined in ways that closely track viewpoint.

The problem is not confined to religious speech, or even to subject matters that are themselves a prolific source of viewpoints. In at least two frequently recurring ways, subject matter exclusions have powerful viewpoint consequences. First, the exclusion of any controversial subject matter insulates the status quo from criticism. Speakers who would defend the status quo have no need to do so if all speakers who would criticize the status quo have been silenced by a subject matter exclusion. Second, speakers who believe that a particular subject matter is unimportant and unworthy of public comment are unaffected by an exclusion of that subject matter; the effect of the ban falls only on speakers who hold the opposite viewpoint, and think that the subject matter is important.

To prohibit discussion of race relations, even in the Deep South in 1954, would be a mere subject matter exclusion, requiring no justification in designated fora under this Court's current doctrine. Similarly today, to prohibit discussion of race relations is to insulate those who are satisfied with the current degree of racial progress and to silence all those who think either that we have gone too far or that much more remains to be done. To prohibit discussion of animal rights, or sodomy laws, or estate taxes, or the electoral college, is to prevent any criticism of an entrenched status quo, and to silence a minority that vigorously disagrees with that status quo. To prohibit any discussion of the candidates for school

board is to insulate incumbents from criticism and to silence those who want a change. To prohibit all discussion of political issues is a subject matter exclusion that insulates the status quo across the board, on all these more specific topics and many others.

A subject matter exclusion of religion has all these vices. It tends to insulate the religious status quo in the community, whatever that status quo may be. It enacts the viewpoint of those who think religion is a purely private matter, inappropriate for public discussion, and suppresses the viewpoint of those who think religion is a vitally important topic. It suppresses religious viewpoints on every issue before the community. And the history of misunderstanding or evasion of this Court's rule protecting religious speech illustrates that those who would exclude a viewpoint can adjust or gerrymander definitions of subject matter to achieve their goals.

The Court need not solve these problems to decide this case. In this case, it is sufficient to hold that Milford has indeed discriminated on the basis of viewpoint. The solution to the underlying problem lies in refining the rules concerning the three kinds of fora on government property. Subject matter exclusions often serve important functional purposes; I do not propose that they be banned or even that they be equated with viewpoint discrimination. But they must be subject to some degree of judicial review.

In *ISKCON v. Lee*, 505 U.S. 672 (1992), four justices proposed entirely abandoning the rules that let government designate the status of various fora. *Id.* at 693-703 (Kennedy, J., concurring). That opinion proposed instead that the Court classify government property as public or

nonpublic fora based on functional criteria. The most important criterion would be whether the proposed speech would disrupt the normal functions to which the government property is dedicated.

That concurring opinion recognized the most fundamental defect of existing forum doctrine: that it "grants the government authority to restrict speech by fiat." *Id.* at 694. The opinion continued:

> [Under the Court's forum analysis,] the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there.

Id. at 695. The Court should reconsider the fundamental wisdom of that concurring opinion. In this case, the Good News Club no more interferes with the normal functioning of the school than do the Boy Scouts or any other club.

There is also a smaller step that would help considerably. The Court could retain the current structure with its three kinds of fora, giving presumptive effect to the government's designation. But the government's designation would be reviewable. Limitations imposed on a designated forum, and closures of designated fora, should not be wholly insulated from judicial review. Government should have to give some functional reason for limits on a designated forum. These reasons would *not* have to rise to the level of a compelling interest. Intermediate scrutiny, or even rational basis scrutiny that is not wholly toothless, would eliminate many arbitrary limitations on

the scope of fora. Government should not be able to exclude a subject matter for no better reason than its dislike of viewpoints or controversies associated with that subject matter or its misunderstanding of the law. Direct review of such motives would be unworkable, but requiring some functional reason would do much to solve the problem.

The current formulation of doctrine already provides that restrictions on speech, even in nonpublic fora, must be reasonable. *Cornelius*, 473 U.S. at 806. At the very least, the Court should give meaningful content to that requirement and make clear that it also applies to limitations on the scope of a designated forum. In this case, Milford's exclusion of religious speech is not reasonable. There is absolutely no reason for the exclusion except hostility to religious viewpoints or a misunderstanding of the Establishment Clause. Neither of these reasons is legally cognizable. One is constitutionally forbidden; the other is an error of law to which courts should not defer. This Court should not continue with a doctrine that authorizes governments to exclude whole subject matters from public places without having to offer any reason.

III. Permitting the Good News Club to Meet Would Not Violate the Establishment Clause.

Permitting the Good News Club to meet in a designated public forum on equal terms with secular clubs would not establish religion. This Court has repeatedly rejected claims to the contrary. *Rosenberger*, 515 U.S. 819 (1995); *Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226 (1990); *Widmar*, 454 U.S. 263 (1981); *see generally* Part I of this brief. This principle

is of course far more controversial when applied to distribution of government funds, but that controversy is not implicated here.

This case is the Court's first encounter with a designated forum in an elementary school, but that does not change the principle or the result. The age of the children may be a reason not to create a forum in the first place; certainly it is a reason to require each group participating in the forum to have adult leadership. But the age of the children does not justify viewpoint discrimination.

The conventional argument for excluding religious speech is that children are too young to understand the difference between government speech and private speech, and will mistakenly assume that the school endorses any religious speech that it permits. Let us first put this argument in context. It does not negate the viewpoint discrimination inherent in excluding private religious speech from the designated forum, and it does not claim that government actually endorses religion by any method ever recognized in this Court's cases. Rather, it is an attempt to justify *actual* viewpoint discrimination on the basis of fears that students may *mistakenly* perceive endorsement.

The claim of an establishment clause violation starts with an empirical claim: that elementary students cannot understand that the Good News Club is independent of the school. This is a dubious proposition empirically, and the school has made no effort to prove it. Nor has it tried to dispel any such confusion by explaining to children that the Good News Club is acting entirely on its own.

Viewpoint discrimination requires compelling justification, not a speculative assertion about what some children might misunderstand if no adult explains anything to them.

The proposition to be explained to the children is not difficult. The central point is simply that government does not endorse everything it fails to censor. Even the youngest children can understand that they have to go to school but they do not have to go to any after-school club. The school is supposed to be neutral concerning the Good News Club. Neutrality may be an abstraction, but a teacher can easily convey that abstraction in terms young children can understand: *I don't care*. "I don't care whether you go to the Good News Club or not. That is up to you and your parents." Or: "Mrs. Fournier doesn't work for the school. The Good News Club is more like a church. It just borrows a room at the school."

More fundamentally, the establishment clause argument does not depend on the children's level of understanding. The argument that children cannot understand first amendment rights would be untenable even if it were empirically true. It is untenable because it leads to an insoluble contradiction.

If students cannot understand that toleration of the Good News Club is not necessarily an endorsement of religion, then they cannot understand that exclusion of the Club is not necessarily a statement of hostility to religion. Milford defends a rule that on its face permits almost any community group to meet at the school so long as it is not religious. This facial viewpoint discrimination conveys a message of hostility that is far more real than any mistaken implication of endorsement that some

student might draw from mere equal treatment. Any attempt to explain away that apparent hostility would depend on a first amendment argument considerably more complicated than the simple proposition that the school does not endorse everything it fails to censor. And on Milford's hypothesis, the children would be incapable of understanding its explanation that it is not really hostile to religion.

The argument that children will think the school endorses religion unless it censors all religious speech on campus is like an argument sometimes heard from the other side of the school-prayer wars – that children will think the school opposes religion unless it teaches religion itself with classroom prayer. Both sides in this long running battle make the same mistake. Both sides say that if the school is not visibly for them, it is against them. Both sides say that neutrality will be interpreted as supporting the other side.

Each side seeks to allocate all risk of uncertainty or misunderstanding to the other. Each side seeks to protect its preferred right – free speech or disestablishment – with prophylactic rules so generous that no human deviation from those prophylactic rules will ever risk violating the constitutional right itself. Neither side can have all that it seeks. When each side's proposed prophylactic rules invade the substantive content of the other's constitutional right, neither clause can enjoy a wide margin of safety.

A solution in which one side forfeits its rights and bears all the risk of student misunderstanding while the other side bears no cost or risk whatever is not a neutral solution. The risk of student misunderstanding can be

minimized by explanations, and any residual and unavoidable risk of misunderstanding must be shared. It is best shared by facially neutral rules in which the government takes no position on religion in its own speech and treats private religious speech exactly like private secular speech. The courts can review what government actually does; they cannot review what every observer might misunderstand. Whatever the risk that some students will perceive a designated forum as an endorsement of all groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows students to talk about anything except religion. *See* Laycock, 81 Nw. U.L. Rev. at 14-20.

This argument does not depend on the age of the children. Elementary school children may have less capacity to understand the premises of a designated forum, but they have the same lesser capacity to understand that exclusion of religion reflects the school's idea of disestablishment rather than hostility. The argument that students cannot understand still leads to the same contradiction and is still soluble by the same facially neutral rules. *See id.* at 51-52.

One branch of this Court's endorsement test "focuses upon the perceptions of a reasonable, informed observer." *Pinette*, 515 U.S. at 773 (O'Connor, J., concurring). This observer's perception must be based on something the government did. When the Court finds a violation of the Establishment Clause:

> This is not because of "transferred endorsement," or mistaken attribution of private speech to the State, but because the State's own actions . . . and their relationship to the private speech

> at issue, *actually convey* a message of endorsement.

Id. at 777 (O'Connor, J., concurring).

The "State's own actions" that convey this message may be subtle; in unusual cases, they may even be unintentional. But to plausibly be perceived as endorsement, *"the State's own actions"* must necessarily include some form of preferential treatment for religious speech – some special privilege, or some manipulation of process to ensure that the religious speaker gets an advantage. The non-mistaken impression of endorsement must be based on some government action, however subtle, that treats religious speech more favorably than other speech. Without that, the perception of endorsement is without basis, and the free speech rights of religious citizens are at the mercy of other peoples' misperceptions.

In this case, there is no ambiguity about what the school has actually done or about what it is being asked to do. What it has actually done is to exclude religious speech, because of its religious content, from a forum open to substantially all secular community groups. That is actual anti-religious discrimination, and it conveys an entirely accurate message of hostility to religious speech. What it is being asked to do is to admit a religious club to a designated forum on the same terms as secular clubs, and to let parents freely choose among clubs that teach morals and character development from either a secular or religious perspective. Such equal participation and parental choice convey no message of endorsement to any reasonable or informed observer. If a child misunderstands, the solution is to give that child an explanation –

not to use the child's mistake as an excuse for immediate resort to flagrant viewpoint discrimination.

Because there is no unequal treatment, there is no reasonable perception of endorsement, and there is no violation of the Establishment Clause.

CONCLUSION

The judgment should be reversed, and the case remanded for entry of an injunction prohibiting further exclusion of religious speech from the designated forum at Milford Central School. This Court should disapprove the Second Circuit's mistaken doctrine that exclusion of religious speech from public fora is often or sometimes a mere subject matter exclusion and not a form of viewpoint discrimination.

Respectfully submitted,

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